



Considering the Costs and Benefits of Lawyering in Drafting Legislation or Establishing Precedents

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CONSIDERING THE COSTS AND BENEFITS OF LAWYERING IN DRAFTING LEGISLATION OR ESTABLISHING PRECEDENTS

PHILIP B. HEYMANN*

I. INTRODUCTION

MANY people in the United States and abroad believe that we are an overly lawyered country. Of course, deciding to buy a lawyer's services for planning or counselling is a free choice by private parties, and we generally assume that expenditures made in this way accurately reflect the only relevant preferences: those of the purchaser. Moreover, the market for legal services is decently competitive. The problem then must be in the way we have organized our society, creating systems that require expensive legal help for private individuals. But if there are ways of writing laws that require less lawyering, why don't we use them? That is the subject I will explore.

The situation is a bit more complicated when we talk about the resolution of disputes about facts or law. All litigation is a mistake in hindsight—in the sense that, if both parties had known what the judgment would be, they (although not necessarily their lawyers!) would have preferred settlement at something like that figure to bearing the costs of litigation to get there. But what in the drafting of a law makes such mistakes more likely, and why don't we act more effectively to minimize the possibility of their occurring? That too is the subject of this comment.

Of course the final judgment is not a fact that only awaits discovery, like the weather in Chicago on the date of our next presidential election or the composition of Mars. It is produced by the activity of parties and their advocates. The fact that the final judgment is not just "found," but is "created" as well, also produces costs the parties would rather not bear. The explanation is straightforward. Since the results of litigation depend upon how much skill and effort are devoted to persuasion—as well as upon the rightness of one's cause—each side has an incentive to invest in persuasion more heavily than its opponent. The resulting "arms race" is costly. (See APPENDIX A.) So I am also

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concerned to analyze what it is we do as a society that encourages competitive investment in persuasion when there is litigation.

My subject is simply this: what is it that we are buying when we create the conditions that demand lawyers? The terms of the trade are not obvious when we make the governmental decisions about substantive law that create these conditions. Only if they become obvious is it possible to choose meaningfully.

A. *An Initial Caution*

Before proceeding, it is important to see an essential issue that is not central to what follows. In looking for the real choices confronting lawmakers that affect the demand for legal services, I am assuming that, if recognized, they would be addressed, and, if addressed, resolved in such a way as to passibly reflect popular wishes. But this ignores very serious questions about political actors' will to address these questions. Lawyers play an important role in much of the legislation with which we will be concerned. Yet the interests of lawyers may not coincide with those of other segments of the population. I have a friend who explains unnecessary obscurity and complexity in the law by noting that if the law required all transactions of a certain type to be carried out in ancient Greek and if there were a number of people trained in Greek to handle those transactions, these people would fight mightily to prevent a reform that allowed work in everyday English. Certainly major segments of the bar have fought in just this way to prevent any effective form of no-fault automobile insurance.

A socialization in certain specialized values may be an even more important form of demand-creating influence by lawyers. American lawyers are taught certain values, among them: an adversary process; the fullest and fairest hearings; the most refined set of rules; a tradition that no harm flowing from another's fault should go uncompensated; the most encompassing standards for determining fault; and a process of appellate review. Lawyers learn to value highly partisan representation, to suspect any final resolution of a controversy that is not judicial, and, above all, to believe in the right to counsel and the importance of legal counsel. As judges or legislators, as advocates or lobbyists, they bring these values, which they hold far more than others do, to bear on the process of lawmaking.

Procedures that are too "lawyer intensive" are not simply the result of lawyers' self interest, their socialization in these values,

or even popular belief in the importance of the same values. The politics that creates an excessive demand for lawyers also includes a calculating use of law and procedure by those who benefit from the barriers that these can impose to any challenge to their position. Any "interest," from low income tenants to major polluting industries, that sees itself as far more likely to be a defendant than a plaintiff in a particular form of transaction may lobby or litigate for additional process or a fuller range of counterclaims and defenses as a way of discouraging and delaying, if not defeating, actions against it. Complex and formal procedures help a defendant who is represented by counsel.

Thus, in focusing on ultimate social trade-offs or choices that determine the demand for lawyers, I am setting aside important factors that may shape the very process of choosing, particularly the self interest and the effective biases of lawyers and clients.

II. THE MARKET DEMAND FOR LAWYERS' SERVICES

A. *The Product*

What is the product that private (or, analogously, public) clients buy when they pay for legal services? Private lawyers serve a half-dozen functions that are valuable to private parties as well as important to the society as a whole.

- They tell private parties what they must do to comply with, or avoid difficulties from, the law (and what they needn't do).
- They help a client keep the actions of others (governmental or private parties) within the bounds of their obligations and duties and to obtain recompense if the actions of others depart from their obligations to the client's harm.
- They defend private parties from legal claims made by governmental or other private parties.
- They help in the exercise of obligation-creating powers delegated to individuals or organizations by contract, property, trust, estate, corporate, partnership, or other areas of law.
- They represent parties, groups, and interests in seeking modifications of the law from courts, legislatures, and regulatory bodies.
- In a miscellaneous collection of situations, lawyers help satisfy the conditions for obtaining government-

tal benefits, licenses, permits, or changes of status, ranging across a very broad area from the pursuit of a major government contract or broadcast license to an uncontested divorce.

Recognizing that private individuals often need help in relating themselves to the political/legal processes of creating, complying with, and enforcing expectations (and in resisting unwarranted claims), we still must ask why and when do people turn to lawyers for these purposes. Why should the help come from someone charging for three years of legal education and a certificate that she passed the bar exam?

For some of these functions, and in some contexts, it needn't. Insurance company adjusters and management or union officials handle hundreds of thousands of accident claims and worker grievances. The most notable developments in some of the most important areas of legal needs of individuals (wills, real estate transactions, divorce, consumer matters) involve shifts away from the use of lawyers, even as the number of lawyers grows and the cost is reduced by new forms of organization and delivery. But for many novel or complex transactions, private individuals and, more often, businesses either must or sensibly will turn to lawyers for help.

B. *The Ingredients*

We have looked at the product clients buy. Now consider the ingredients. What skills and services is a private client buying when he wants help in any of the situations where his relation to law and its enforcement is in question? These include prominently:

- Knowing or being able to find what the law says an individual, organization, or governmental unit may, must, or may not do.
- Handling the procedures in courts, agencies, and legislatures.
- Planning (foreseeing contingencies in a relationship) and drafting (dealing with them clearly in writing).
- Marshalling relevant historical facts.
- Making persuasive arguments about rules, powers and historical purposes.
- Negotiating.

What advantages do lawyers have in furnishing a product made of these skills and services? Law school and experience in practice develop all these skills. But lawyers enjoy or seize additional advantages. The law restricts the freedom of non-lawyers to sell the first two services. The third—planning and drafting—often involves tax and regulatory consequences of sufficient importance to make it essential to have, as an active participant, someone legally trained.

C. *The Market*

An overwhelming portion of our non-governmental lawyering is simply purchased on the market. This means that a lawyer generally provides one of these skills or services and serves one of the private and social functions just described only under certain scarce conditions. An individual must realize that, in the particular situation or transaction, the law offers, requires or threatens something relevant to her well-being (a condition that may itself require some minimal access to lawyers or those in contact with lawyers). Two additional conditions must be met. First, the difference between the expected results with and without a lawyer (the stakes) must appear to exceed the likely attorney's fee. Second, either the client or her supporters or the lawyer must be willing and financially able to make the investment of (take the chance of losing) the fee and costs in the hopes of realizing the stakes.

We can be more specific about the nature of the demands for lawyers for counselling and for partisan help in dispute resolution, and this will prove useful as the argument proceeds.

D. *Counselling*

A client will pay a lawyer for counselling services when the reduction in uncertainty about legal consequences is worth the price charged for the lawyer's advice. A private party considering several alternative paths can see that one path has certain risks of criminal prosecution or civil litigation with attendant costs to reputation, energy and funds. Or, one action may be desirable if, but only if, there is a way to feel secure as to how other parties will behave or relate to a proposed enterprise over time. There may or may not be subsidies or tax benefits, regulatory requirements or tax obligations, associated with various paths. The client can see that the path she should choose may depend on the legal risks, costs and benefits associated with each alternative. Even if

she can guess some of the probabilities and anticipate some of the possible results, it is very often worth the cost of a lawyer to get better estimates of each of these.

E. Partisan Help in Dispute Resolution

The narrowest view of the market for services in dispute resolution is even more familiar. Any potential plaintiff knows that the total benefit to her will be only the expected value of the judgment less the costs of her attorney's fees and less the burdens imposed on her by litigation and by disruption of the relationship with the defendant. The defendant knows that he will have to pay the expected value of the judgment plus his attorney's fees as well as bear the burdens of litigation and the damage to whatever relationship there was with the plaintiff. As a first approximation—i.e., ignoring the “arms race” possibility described in the Appendix—it is fair to say that there will be a demand for lawyers' services whenever the increase in the expected value of the judgment (either by an increased chance of winning or by a change in the likely remedy) exceeds the costs of the lawyer's services. It is only necessary to add at this stage that much more than a single judgment may be at stake for either party to a dispute. The most important stake may be a change in the law or a message sent about litigating strategy or the effects on actions others take in light of the prospects of future litigation.

At the very core of the demand for partisan help in dispute resolution lies the production function of persuasion of a judge or jury or legislature in an adversary system. In many situations, over a broad range of investment, each party may enjoy a substantial payoff in persuasiveness from the investment of time, effort and skill in discovering and marshalling facts, handling arguments about expectations and powers, and more general articulateness. This is inherent in the very nature of persuasive factual, normative and legal argument about matters of fairness, expectations or desirable social policies.

We now use lawyers to make these arguments in judicial settings, giving them a monopoly there. But even if others were substituted, the stakes of parties in winning disputes before courts or agencies and in persuading lawmakers would sometimes warrant recourse to highly expensive efforts to produce persuasiveness. That is simply a matter of the relationship between the stake a party has in success in persuading and the benefits that result from increased efforts to make a persuasive case.

III. THE SOCIAL FORCES, SOME USING LAW AND OTHERS NOT, THAT DEFINE, ENFORCE, OR LIMIT SOCIAL EXPECTATIONS

Let us now turn to choices about the substantive law which substantially affect the demand for lawyers' services. What is the context for these crucial, demand-defining political decisions? Every society requires for its members some substantial measure of stable expectations as to what other people and institutions must, may and may not do. Defining and enforcing such expectations are two central roles of law, courts and lawyers. But choices about law made by courts or political institutions are only one of the societal devices for creating and enforcing stable expectations.

The necessary background for understanding when a society chooses the costly path of using lawyers and legal institutions is a recognition of the alternative sources of social expectations and their enforcement. Legal institutions play a supplementary role, not the lead, in performing these crucial societal functions.

A. *Defining Social Expectations*

There are a number of powerful social forces *creating expectations*. For one, normative expectations about everything from the way I dress to who is entitled to my respect and deference are created and defined by tradition and custom without need of help from law. To take another, organizations to which I "belong" create worlds of normative expectations, particularly in the form of roles. For example, much of my daily life takes shape around the demands of a work environment created by private individuals or institutions that government and law have simply empowered with the control of property. My normative expectations about the goods and services I acquire and consume are created by a market economy as well as by the laws that protect it. My expectations about a whole set of long-term relationships characterized by mutual dependence—i.e., by a shared recognition of the costs to each of withdrawal—are partly customary or even legal but largely mutually defined by the participants over time.

Considering this complex as a whole, government and politics—carried out by elected officials, courts and bureaucrats—play a relatively small part in the creation of normative expectations. Our government creates or defines expectations in three primary ways. First, courts, elected officials or bureaucrats directly create

or recognize duties of private parties—what they must or may not do. Second, government empowers private individuals and organizations with what they need to create additional expectations—by recognizing their freedom to choose much of what they do, by granting them substantial control of the use of various scarce resources, and by guaranteeing performance of agreements by individuals to sacrifice some of this freedom or some of this control of resources in order to accomplish cooperative undertakings by acting in predictable ways. Third, government uses law to define the scope of governmental authority itself—to authorize and limit both the authority to create private duties or powers (to make laws) and the authority to act directly in the name of the state.

A new environmental law or a civil rights statute or an income tax are unusual examples of relatively major intrusions into a world where other forces create most expectations about how other people and institutions must, may, or may not behave. The far more frequent legislative or judicial tinkering with relatively narrow areas where there is disagreement about present norms or powers is, when compared to the world of expectations, just tinkering.

B. *Social Enforcement Devices*

The role law plays in enforcing expectations is also generally exaggerated. Divide the worlds of compliance-inducing measures somewhat too sharply into two: the moral and the coercive.

Schooling, training by parents and peers, reading, movies and television—all of these not only convey societal expectations but, at the same time, teach the rightness of acting in accordance with those expectations. That is, they develop and direct the forces of shame and guilt. This teaching has little to do with law. There is one *very* notable exception, though. No ethical message is taught more passionately and persistently in the United States than the duty to respect and obey the law. That means that government, whether courts or legislature or executive, has the power to bring conscience and training to bear as a device for enforcing expectations simply by anointing them with the oil of legitimacy and calling them “law.” (Something of the same magic can, of course, also be done in the name of patriotism.)

In the realm of the coercive sanctions, social pressures may be the most pervasive: the threats of loss of group acceptance or respect and status. Henry Hart pointed out that the government uses these as important threats associated with the criminal sanc-

tion,¹ but they more often operate without close ties to law. In a somewhat related way, the expectations created in a long-term relationship with a spouse, a colleague, or even with a supplier are generally enforced by a threat of withdrawal (“exit”) or by any of a number of petty retaliations designed to remind the other of the immense capacity of each to make the relationship more or less rewarding.

“Exit” and petty retaliations are just two of the forms of “self-help” that private individuals, acting alone or organized into groups, may bring to bear on another to enforce or create an expectation about the other’s conduct. Strikes and boycotts are obvious additional examples. Again, law is in the picture, but not central to self-help. It defines what *may not* be done by private individuals and thereby defines what may be done at least if the objective is acceptable.

Law is the central enforcement device only when government, generally through the use of courts, threatens the use of its power as well as its legitimacy to enforce compliance or compensation for noncompliance and thus guarantees the security of expectations. Official governmental application of legally created expectations to fact situations—all the burdens we assume in the form of adjudication or administrative decision—is necessary to deal with three problems. We use civil and criminal sanctions to enforce expectations that are being *willfully* disregarded. I will sometimes call this the problem of “bad faith,” although it often involves willful disregard of expectations that were not directly created by some free and personal act. We also use tribunals to handle uncertainty—to resolve *bona fide* disagreements about what is expected of whom so that parties can get on with their lives, work and relationships, knowing what to expect and yet not feeling that they have been made the victims of extra-legal obstinacies or self-help. And, we use judicial review to deny effect to the unauthorized actions of government officials.

My point, so far, is this: Actions by elected officials, bureaucrats or judges are important sources of the creation of social expectations and of enforcement of these expectations, but they fall far short of dominating these social functions. Law generally plays a *supplementary* role in societal arrangements.

1. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBLEMS 401, 404-05 (1958).

IV. THE EFFECTS ON THE DEMAND FOR LAWYERS' SERVICES OF
THE Pervasiveness AND THE EFFICIENCY WITH WHICH
RIGHTS AND REMEDIES ARE DEFINED BY
GOVERNMENT

A. *Counselling*

How does the demand for lawyers vary with the extent to which law—as opposed to its social competitors—is used to create normative expectations? The answer is not obvious. Consider first the question of counselling. Of course, if there were no legal rules applicable to a particular area of human behavior, there would be no need to hire lawyers to explain what they require and the consequences of disregarding them. On the other hand, even if there were a dense network of rules regulating the area, counselling by a lawyer would be unnecessary if the rules were well understood. Each state has a thick volume of rules of criminal law and so does the federal government; yet ninety-nine percent of the citizens are able to comply quite fully with these rules, without legal advice, because their content corresponds so closely to a lifetime of teaching in family, school and private groups.

The condition that creates a demand for legal assistance in the form of counselling is one where clients are aware that there are, or may be, rules (1) that bear upon their activities in important ways, and (2) that they cannot themselves find, understand or apply to the particular situation. In buying counselling, clients pay for the superior ability of the lawyer to predict what people are required to do and are likely to do in response to legally imposed and legally enforceable normative expectations. The total volume of law bears on this only as a greater total quantity makes it more difficult for the client to assimilate legally binding expectations.

The relationship between quantity of law and the need for lawyers is complicated by the effects of familiarity. I have already mentioned these effects in the context of traditional criminal law. There are also highly regulated areas where the pattern of regulation has become familiar in which the capacity of individuals or organizations to assimilate what is required is more than adequate without having to turn regularly to lawyers. Thus, over time, regulatory requirements in the environmental area have tended to be handled first by law firms, then by counsel within the organization and trade associations and, finally, by engineers and others within the firm.

B. *Dispute Resolution*

The relationship between the demand for the services of lawyers in dispute resolution and the extent to which expectations in a particular area of activity have been embodied in law reflects a somewhat different pattern from that in counselling. Problems of dispute resolution may arise either because one party is behaving in bad faith, ignoring what he knows to be the obligation imposed by law, or because there is uncertainty about the meaning of the law or the remedies it promises as applied to the factual situation. There is an obvious relationship between the demand for litigation to enforce good faith compliance and the number of situations in which the law offers an opportunity to require some action or restraint by taking another party to court. Thus, the use of litigation to deal with problems of bad faith increases with the extent to which expectations are made legally binding.

Most disputes involve uncertainty rather than simply bad faith. In these cases, if the potential plaintiff and the prospective defendant (perhaps having the benefit of counselling by their lawyers) have similar views about the expected value of the judgment the plaintiff may obtain from litigation, they will both have a strong incentive to settle to avoid the additional cost of legal fees, personal participation and disruption of relations. Litigation will only arise, and indeed lawyers will only be used, when there is a substantial difference between the figures the plaintiff and the defendant get when each separately multiplies his best estimate of the remedy the plaintiff is likely to enjoy times the chance that the plaintiff obtains that remedy. Uncertainty about one of the ingredients of this short formula is at the heart of the use of lawyers in dispute resolution.

The demand for lawyers in dispute resolution thus turns primarily on whether the rules in a particular area are such that even lawyers find it difficult to predict what a court will say they mean, or to agree upon the facts that the rules make relevant, or perhaps to predict how a judge or jury will react to the picture produced at trial. While counselling is most in demand where there is the greatest difference between the ability of the lawyer and her client to identify what is expected and to predict the consequences of these expectations, the demand for lawyers in dispute resolution generally depends upon the difficulties lawyers themselves have in making reliable predictions. "More law" may increase *or* reduce the extent of uncertainty about the meaning of the set of legally created expectations relevant to particular fact situations.

There is no basis for concluding that new statements of what one must or may not do will increase litigation.

C. *A Summary*

In short, the total quantity of law or regulation bears no very direct relationship to the need for lawyers except as it creates unexpected or unclear demands. There is thus much room to be skeptical of the argument that the way to reduce excessive reliance on lawyers in our country is to reduce the amount of regulation and taxation of individuals and organizations. For one thing there is generally a hidden agenda at work. As a practical matter, the primary and overriding issue in almost all cases of regulation and taxation is the case for, or against, the particular interference with individual choice or the propriety of the particular form of taxation. The cost of lawyers is rarely a sufficient ground for eliminating what would otherwise be an appropriate governmental measure.

But beyond that, an emphasis on the extent or pervasiveness of law is simply mistaken. Certainly there is some foolish regulation, perhaps much of it. It is also true that much regulation requires the use of lawyers for counselling, planning, negotiation and adjudication. But it is the novelty, complexity and uncertainty of the regulation or taxation, not its extent, that leads to the use of lawyers. And, in many cases, regulation (such as auto-safety rules) may reduce the need for lawyers by reducing the harms (auto accidents) that occasion litigation.

What most people mean by "more law" is that more of what individuals or businesses do is determined by judicial or political choices that take the form of a demand that someone "must" or "may not" do something. And what most people mean by "less law" is that more of what happens is to be a result of judicial or political choices that take the "may" form, allowing individuals to decide for themselves what they will do with their property or in their actions. But on a little reflection it becomes clear that the uncertainty which requires lawyers is only sometimes related to whether the applicable rules require or forbid certain actions rather than leave the choice to an individual.

Lawyers are only required when there is likely to be some form of interaction among two or more sets of individuals, organizations and governmental units. Legal assistance is only required when there is some uncertainty as to what can be expected of each. When prohibitions or requirements are clear and tradi-

tional (e.g., the prohibitions of theft or murder), there is little need of lawyers although they take the “must” or “may not” forms. On the other hand, when authorization or permission has a novel and ill-defined character—if others cannot tell where the “may” begins and ends in a confrontation with “may not” or “must”—there will be a need for a third party resolution and for legal services. For example, a new permission to sell and use one particular form of cocaine, or to exclude from tax a particular form of receipt or income, would spawn much new legal counseling and litigation.

It is true that there is often greater uncertainty about the scope of regulation or taxation than about what one may do, absent regulation. But the greater uncertainty is attributable to the fact that the regulation or taxation is assumed to be relatively novel and the freedom to act is assumed to be traditional and thus within well-understood boundaries. It is the background of familiar custom that creates more stable expectations, not the form of law. This does not mean that *new* laws and *new* regulations are without special costs in terms of lawyers and judicial proceedings. It simply means that these costs can be handled more logically as part of the problem of uncertainty and the task of better defining legal expectations.

D. *Economic Efficiency*

It is also true that the demand for lawyers’ services is only marginally related to the economic efficiency with which rights, duties and liabilities are allocated. Where individual responsibilities are clearly located for better *or worse*, we create an incentive for private agreements whenever the gain to the parties from agreeing to reallocate their rights and responsibilities is greater than the cost of the transactions necessary to reallocate them. The result of an inefficient allocation of rights and responsibilities—the very definition of an inefficient allocation—is that it either requires too many such transactions or stops desirable activity. But none of this affects the number of disputes. And it bears on the use of lawyers for counselling only as the increase in the number of transactions may require more counselling services in the form of planning or negotiation.

V. THE CHOICES AS TO HOW TO DEFINE LEGAL RIGHTS AND
REMEDIES THAT DETERMINE THE DEMAND FOR LEGAL
SERVICES

If it is the abstruseness and unexpectedness of some of our laws that create a demand for counselling, and if it is the indeterminateness of some of our laws that requires professional legal help in dispute resolution, we are in a position to ask when and why we choose or accept those qualities, which turn out to be costly in terms of the fees for lawyers that they encourage, in defining legal rights and remedies. We know that the answer is only loosely connected with our views as to the desirability of regulation and even with our attitude toward efforts to use the law to encourage or duplicate the results of a market. What is it then that we buy with the qualities of unexpectedness and abstruseness and indeterminateness?

The object of addressing this question is to identify the more ultimate trade-offs that courts and legislatures face when they address the definition of new rules or remedies and recognize that they are also, inevitably, affecting the market demand for lawyers. The way legislative and judicial decisions influence the demand for lawyers is not immediately apparent to them, nor is it generally the focus of their attention. Intelligent choice requires studying the mechanisms as we have been doing and making more salient the consequences in terms of demand for legal services. But, in the final analysis, we *do* buy something when we define rights and remedies in a way that creates a demand for lawyers. This is not to suggest that all is well. Obviously all is not well in the legal system and, equally plainly, important choices are not being addressed. But if the choices were seen and addressed, they would often be hard to resolve.

Even if one were putting together a new society, much like ours, but with the considerable freedom to change the way we conduct our affairs, there would be a set of functions that lawyers now perform which most people would feel were still essential in a modern society. The society would have rules that created important expectations. First, someone would have to be responsible for seeing that these rules were enforced either by public or private litigation and that they were not enforced improperly. Second, the creation of a structure of rules and the presence of a set of background understandings against which they operate would generate a certain demand for expertise in interpreting what was required in particular situations. The economy of spe-

cialization alone would mean that there was a need for those specialized in handling the complexity and, to private individuals, novelty of some requirements of law. Abstruseness and unexpectedness could not be completely eliminated. Third, lawyers would be needed to resolve the indeterminacy about the application of law to particular fact situations where private parties disagreed about their rights, duties and remedies even if we could reduce the indeterminacy considerably. Finally, legal experts would be useful in designing rules and private arrangements. These are specialized matters in a modern, sophisticated, complex economy and society.

The question is not, therefore, whether one would want to do away with all the lawyers but whether we are making sensible choices when we create the conditions that require more lawyers to perform one or more of these four functions. In the most obvious case we have some sense of what we are buying (increased accuracy of factfinding and a richer exploration of how the law should apply to those facts) when we provide elaborate adjudicatory procedures. And of course we know the cost in terms of legal fees and reduced access to those with small stakes who are unable to fund the investment. It is a well financed and bold plaintiff who sues *The Washington Post*, *Time* or CBS for libel. We have at least a sense of the cost in terms of counselling fees of abstruseness and unexpectedness in our laws; but what do we buy with these characteristics? And what do we get for the increase in demand for litigating services that comes with indeterminacy of legal rules?

A. *Counselling and the Abstruseness and Novelty of Legal Rules*

What affects the demand for counselling? More than abstruseness and novelty is involved. Private parties will seek counselling services more when there is a greater chance that there will be an effort at enforcement of rules against them by private or government parties, when the chance of success is substantial, and when the penalties, formal or informal, are greater if they fail to comply. Counselling will be called upon more when there is no highly competitive alternative course of action which does not require or benefit from legal advice. Still, there are obvious legislative and judicial choices that go far toward determining the demand for counselling.

There will be a greater demand for counselling if private parties recognize that there is a substantial chance that a rule of regu-

lation, taxation or subsidy may be applicable to their activities and yet be unknown or unfamiliar to them. There is more need for counselling where the meaning of the rules is new and unclear. Counselling will be more necessary when unusual forms of documentation or more complicated steps of compliance are necessary to bring one within or keep one without the scope of a rule. Counselling will be more necessary where the interaction of different rules or different systems of rules is intricate.

At some cost to our other purposes we can always reduce the need for counselling, as we can reduce the likelihood of litigation. We know how; it is simply a matter of choosing. Only here the crucial concept is not "indeterminateness" but "abstruseness" and "novelty." The question here is what do we get in exchange for novelty and abstruseness? In large part, the answer is a capacity to change social expectations by government choice.

Departing from the pattern of expectations that has been created by custom, social morality, organizational mores, market demands and ideology, and well-integrated bodies of prior legislation and decisions—i.e., deliberate, governmental chosen social change—automatically creates novel requirements and liabilities which are almost as surely esoteric or abstruse for a period of time.

As an exercise in imagination, think of law—whether promulgated by courts, legislatures or executive officials—as if it were an overlay on a background of custom and the demands of a modern market and organizational structure. The law relates to what I have defined as "the background" of normative expectations from other sources in two ways. First, sometimes the law is used to reinforce the normative expectations created by that background by bringing the law's own moral legitimacy and its promise of coercion to bear on their behalf. Almost all of the criminal law takes this form and so does much of contracts, property and torts. Second, in a dramatically different way legal expectations, created by government, are sometimes used to overrule and displace custom or other sources of normative expectations. The change may be a minor redefinition in an area where social expectations have been unclear, or an imposition of a unified set of expectations on an area of cultural diversity. Or it may be something still more dramatic: a political rejection of formerly accepted traditions or a redefinition of the authority of some rival form of social or economic control. A major civil rights act falls in this category.

The relationship between law and other sources of normative expectations has a great deal to do with questions going to the extent of the use of lawyers in society. Whatever social arrangement has been long established has generally worked out the relationships among its parts in a relatively predictable and stable way. I take that to be a law of nature. Professor Lon Fuller made much of a passage where Wittgenstein notes that if I ask my neighbor to teach my children how to play a game and he teaches them a gambling game, I can meaningfully exclaim that that was not the type of game I meant, although neither of us ever consciously considered the question.² An army of social messengers told my neighbor that I was talking about something else. My wife can accurately finish a sentence that I have hardly begun in a way that no one else could. Stability, meaning, predictability—all of these grow rich with time and repetition. Change is the parent of uncertainty. Novelty gives birth to confusion.

To the extent that we use law to change the expectations of custom, organization or the market by granting new permissions or powers or imposing new duties, we (i.e., government) create uncertainty by displacing and rending the rich texture of prior understandings. An overlay of new expectations imposed by government creates uncertainty as to how much of the old remains, and uncertainty as to the meaning of the new terms enacted by legislatures or announced by courts.

The decisions that create a need for legal counselling may be the byproducts of far broader social change. The departure from prior expectations may be occasioned by a shift in the moral judgments of a large part of the population (as with civil rights after the Second World War), by a technological development such as the computer or the videotape player, by the economic implications of a new governmental or regulatory system (Medicare or environmental protection) or by the development of a new form of organizational structure, securities market or business. With such changes inevitably comes a requirement of altered legal expressions of normative expectations and new forms of enforcement. The altered legal structure may take the form of new statutes or new interpretations of very general terms of the Constitution or legislation. In all these cases, the expense of counselling cannot be far behind.

2. See L. FULLER, *THE MORALITY OF LAW* 138-39 (rev. ed. 1969); see also L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 33 (G. Anscombe trans. 3d ed. 1958).

Uncertainty is the price we pay, for a while, when government purposely changes normative expectations. Uncertainty is also the cost of inviting private individuals and organizations to undertake economic, social and political initiatives, held together by new legal structures and new, self-created systems of normative expectations. For this too it is necessary to limit the reach of powerful customary normative expectations about how the parties must behave and how they should relate to each other, and to come to understand the interaction of newly-created expectations with the old.

B. Dispute Resolution and Indeterminacy of Legal Rules

Consider now litigation and what it is that brings about situations where the attorneys for two parties may very well assess quite differently the expected value of a judgment to the plaintiff (i.e., situations in which the parties are likely to litigate rather than settle). These situations have one or more of three characteristics. First, the meaning of the law may be relatively unclear and therefore subject to debate before courts. Second, the law may be clear but worded so as to turn on relatively open-ended questions such as fault, due care, the best interests of a child, etc.—standards that invite the consideration of a very broad range of facts and the exclusion of very few considerations as irrelevant. Third, the crucial facts may be unknown to both parties or, almost as bad, peculiarly within the knowledge of one. Indeed, the facts may involve matters that have to be explored and developed for the first time as part of litigation (e.g., the share of a particular market that a company involved in a merger will enjoy).

At some cost in terms of our substantive purposes and the refinement with which we can tailor the law to their demands, the likelihood of litigation can be reduced by rules that rely on familiar concepts and relationships, that sharply limit the number of potentially relevant facts, and that shape results around factual determinations that are both inexpensive for each party to make and involve facts accessible to both parties. We know, for example, that insurance companies settle minor accident claims by recourse to a set of mechanical rules, one of which is that in an accident between two cars going in the same direction the one in the rear is liable. The rule (a) uses familiar concepts, (b) sharply limits the number of relevant facts, and (c) makes the results turn on facts available at little cost to both parties.

At the opposite extreme is the rule of libel law that a public figure can only collect if he can show that defamation by the press was intentional or grossly reckless. The ultimate concepts are unfamiliar and not used in other contexts; the standard of gross recklessness opens a very wide range of relevant factual exploration; the crucial facts are in the hands of only one party which has no incentive to share them. The factual determination is expensive for the press and even more expensive for the plaintiff who must extract the facts, like a dentist pulling teeth from an unwilling patient, by extensive coercive procedures.

Some measure of indeterminacy is built into the use of language. Ambiguity about the application of words to factual patterns is simply a fact of prescriptive language. But we know how to reduce indeterminacy. Some words are clearer than others, and some concepts are less difficult to apply consistently and predictably to factual situations. Finally, we have some power to choose the factual situation on which the applicability of a duty or the availability of a remedy turns, and that may be a factual situation more or less open to the observation of the parties to any likely dispute. So why do we create the conditions of costly indeterminacy? Some of the reasons are clear; two are of central importance.

First, there are great benefits to making our prescription of duties correspond to familiar moral and social expectations. Where a specification of conduct in more determinate terms would necessarily require omitting many of the factors that are considered relevant in everyday moral judgment, we must consider the costs in acceptability of the law from defining expectations for legal purposes in a way that is out of line with general moral judgments.

Rules that are applicable to large numbers of people who are, in turn, expected to internalize normative expectations, should be simple enough to be memorable and should be, if possible, part of a coherent moral structure. The cost of this is often to make liability or responsibility turn on the presence of facts unlikely to be inexpensively available to both parties, thereby assuring expense and uncertainty in litigation. If we want obligations to correspond to moral responsibility, that may depend on what the defendant was aware of and intended when he acted. The premises of Western morality thus provide the fertile ground for requiring the plaintiff to undertake costly factual determinations of another's mind and practices.

The second benefit we seek with indeterminate rules is, of course, more factually specific, richly contextualized decisions. In the context of planned transactions, blunt but clear rules can facilitate agreements by which the parties can adjust their expectations to the particular fact situation they are confronting. Unless a single resolution of a particular indeterminacy might avoid the need for many transactions in a number of future cases, there is little to be gained from encouraging the parties to involve a judge in shaping their particular responses to a very specific situation for which they can plan and agree in advance. But the situation is different when the transaction cannot be planned, as for example in the case of automobile accidents.

Some factual patterns are unanticipated and some reflect changes in the world. Almost by definition, indeterminate and broadly purposive or moral terms are better able to express the considerations we want a decisionmaker to bring to bear on unanticipated situations. Determinate language says nothing about unanticipated situations, or it may say the wrong thing. Whether indeterminacy lies in the meaning of the legal concepts or in the range of facts they make relevant, it often reflects a decision by the legislature or court that promulgated the indeterminate mandate to delegate to another decisionmaker, operating at a later time and in a far more specific, narrower context, the question who may, may not or must do something. In this situation we create litigation as part of the very process of deciding what normative expectations are in the situation. First the parties to a dispute and then whoever is called upon to resolve it must address their relations in a highly specific context where moral or purposive judgment can be brought to bear more confidently than in the abstraction of the initial definition of the rule. We may also seek the benefits of very focused argument as part of litigation.

VI. CONCLUSION

I have sought to identify what benefits we get as a society from those decisions of judges and politicians that create a demand for legal services. But this pursuit may suggest too rational a choice process. In addressing this question one must not forget that some of the costs of lawyering are incurred because lawmakers simply do not recognize the relationship between their choices and these costs, and others result from the political muscle of those whose values or interests lead them to impose these costs on others willingly.

There is another, deeper issue as well—a matter of culture, not politics or economics or ignorance or self-interest. It is fair to ask whether we would have to worry about abstruseness, novelty and indeterminateness if we were simply a people more respectful of customary values. Social attitudes matter in assessing the need for lawyers. Even for planned transactions, the amount of legal assistance required obviously varies with social attitudes toward sharp dealing. For the functions of dispute resolution and counselling, the demand for lawyers is very centrally a function of two basic cultural variables: the degree of uniformity of our social values and our attitude toward violation of customary norms. If these were different, we would hardly have to attend to how we write our laws. Let me explain why.

To a remarkable extent, most of us are able to comply with whatever the law expects of us without expert help. How is this possible without lawyers? We learn what is expected of us in the form of social norms in the rich variety of ways I have described earlier; we comply out of habit, belief and fear of non-legal social sanctions; we use the devices of self-help to press for the compliance of others. A need for lawyers doesn't arise because, to the significant extent that the non-legal normative obligations we take seriously are broader and fuller than our legal obligations, compliance with the former renders legal counselling and defensive litigation unnecessary even if the law is quite uncertain. Thus the law relevant to our obligations and remedies may be abstruse, novel, and indeterminate without affecting the need for lawyers. In short, the demand for lawyers is a function of the scope of, and the extent of compliance with, familiar non-legal norms as well as of the extent of cognitive uncertainties about legal rules and their application to particular factual settings.

I earlier invited the reader to picture the law as an overlay on other forms of normative expectation, sometimes coinciding with those expectations and sometimes creating new expectations that go beyond the customary and familiar. In fact, a realistic picture would show that legal obligations are generally a smaller province very largely contained within a broader country of various non-legal normative expectations. If one avoids crossing the wider boundaries and violating non-legal normative expectations, one will also generally avoid questions about whether one has crossed the boundaries of the province and thereby incurred some legal liability..

Societies differ as to the seriousness with which they look

upon conduct that violates no legal rule but is widely considered socially undesirable, and they differ as to how widely major segments of the population accept the same set of non-legal norms. The need for lawyers is obviously a function of these differences in attitudes. Where non-legal norms are very widely shared and socially enforced with great determination, issues as to the scope of legal obligations are less likely to arise.

The point is simply this. Both counselling and dispute resolution disproportionately involve conduct occurring at the border between an area of legal obligations and an area free of such obligations. If non-legal devices for enforcing normative expectations keep most people well away from this boundary by keeping them beyond the more remote line that marks off what is socially accepted from what is socially disapproved, there will be far less demand for lawyers for either counselling or dispute resolution. In societies and in situations where there is no effective sanction against conduct unless it is subject to civil or criminal remedies, the demand for lawyers will be far greater.

Many in the United States do not want a society that strongly encourages uniform social norms and is quick to condemn and impose social sanctions on any violation of them—rather than focusing its social condemnation, as we now do, on violations of law. We have come to suspect as well as value customary structures and to value as well as respect both social and economic entrepreneurs.

We remember that segregation in the United States was a customary norm, and custom once strongly supported a terrible indifference to long hours and low wages. Sit-ins and strikes were considered by many to be clear violations of established norms, but we now celebrate the triumph of these initiatives carried out at the borders of the law. We recognize a relationship between violating customary norms and raising for political resolution essential questions about our fundamental understandings. Similarly, customary norms may condemn the competitive imitator of an unpatented improvement as a thief of ideas, the price-cutter as someone indifferent to the welfare of the industry, and the shrewd speculator in oil reserves as the scavenger hoping to exploit general hardship if the OPEC cartel tightens the screw. But we also recognize that these activities may be valuable in a vibrant, competitive economy.

The private entrepreneurs of social and economic change frequently violate customary expectations. Much of our constitu-

tional law of free speech and freedom of religion has been made by such moral adventurers. They operate in the frontier area beyond the boundaries where social condemnation begins but often can keep themselves safely on the "right" side of the limits set by the boundaries of legal obligation. We recognize that those who are merely selfish and indifferent to the normative expectations of others also occupy that frontier area, but there is no way to shut it off to the latter group without closing it to the group of social and economic entrepreneurs as well.

Societies choose the weight that they will give to individual freedom and that they will accord to the non-legal normative expectations of others. Both are valuable. A more conservative society either expands the province of legal obligation until it includes almost all of customary moral obligations or uses non-legal sanctions of a variety of sorts to render the area between law and customary morality uninhabitable. A more daring society maintains a tentativeness about the usefulness of even informal sanctions within the frontier between moral and legal obligations. And, whatever a majority wants, guarantees of freedom of association, freedom of speech, freedom of religion and freedom of movement may go far towards creating supportive communities which provide sanctuary against broader social condemnation.

In sum, a final major condition of the demand for lawyers in the United States is a liberal unwillingness to blame what is not illegal and a national pluralism that provides the protection of greater or smaller communities against the social force of customary morality. The result is that contests over what can and cannot be done are far more likely to take place along the boundaries of the legal, requiring the aid of lawyers in counselling and litigation and making crucial the political choices regarding the amount of indeterminacy, abstruseness and novelty in our laws.

APPENDIX A

Since litigation is a game where one party's gain is another's loss, each party's chance of winning depends not only upon how much she invests in persuasion about facts or law but also on how much her opponent invests. Consider the basic alternatives available to each party in this regard:

- (a) to spend much more than the opponent does;
- (b) both to spend about the same amount and that to be limited to what the parties might agree on in advance recognizing the costs of an "arms race" in litigation expenses;
- (c) both to spend about the same amount but for that to be much more than in (b); or
- (d) to spend much less than the opponent does.

When the stakes for both parties are high relative to the costs of investment in persuasion, each must often rank the alternatives, from best to worst, as they are listed above: outspending the opponent, both spending little, both spending much, and, worst of all, being badly outspent by the opponent.

If each party decides that his wisest strategy for investment in persuasion is to avoid the worst alternative, (d), and seek the best, (a), the result is that both will invest heavily without either enjoying the advantage that each sought from outspending the other. Each seeks alternative (a) but both get (c). Both would have preferred spending much less and ending with (b).

The familiar analogy to this process is that of an arms race between two nations. The only conditions this model of mutually harmful behavior requires are that each side can see benefits from making greater "productive" investments than the other side or can see great dangers from being left behind, and that there is no very satisfactory way for the parties to get together and agree, in a way that each can rely upon, to limit their total expenditures. These conditions apply to many forms of strategic weapons. They also apply to litigation in many situations. But they apply most damagingly when the way that law has been expressed seems to offer particularly enticing prospects to investment in persuasion. So we return again to the central question: when and why do we create these conditions which turn out to impose greater costs of lawyering?

PREFACE

As a new addition to the pages of the *Villanova Law Review*, we are pleased to present two outstanding briefs submitted by Villanova Law School students in moot court competitions in 1990. Both teams brought back top honors in their respective competitions.

The first brief is that of the winning team of the Domenick L. Gabrielli Family Law Moot Court Competition sponsored by Albany Law School of Union University. This national competition, held in March 1990, focused on the controversial issue of fetal rights versus maternal rights.

The second brief is that of the winning team in the Theodore L. Reimel Moot Court Competition sponsored by Villanova University School of Law. The final round for this competition, solely for Villanova students, was also held in March 1990, and centered on the constitutional and equitable issues involved in the disqualification of homosexuals from serving in our nation's military.

In both cases, the teams from Villanova were required to brief and argue the side for the appellants. All facts contained in both briefs were recited in the records prepared for the respective competitions and are not reprinted here for the sake of brevity. The teams were judged on the quality of their legal writing as well as the caliber of their oral argument to a panel of judges.

We are indeed proud of the achievements of the winning teams and are equally proud to be able to reprint the product of their labors.

